

# **Security and the Sacred: Examining Canada’s Legal Response to the Clash of Public Safety and Religious Freedom**

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## **ABSTRACT**

In recent years, the Supreme Court of Canada has grappled with the issue of religious freedom within the public sphere. Particularly, the Court has examined the question of when, if ever, religious freedom should yield to perceived public safety concerns. These perceived concerns have involved numerous forms of expression, but the discussion has most often focused on the *kirpan*, a small dagger, and an important article of the Sikh faith. This article examines the rulings of Canadian courts with respect to this and other faith-based articles of expression, and posits that a clear, consistent legal approach has yet to be articulated. The article then attempts to outline what a desirable rule for these cases would look like, taking Canada’s legal history and prevailing values into consideration in doing so.

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## I. INTRODUCTION

On September 11, 2008, a teenager was arrested in Montreal, Canada and

charged with criminal assault.<sup>1</sup> The public high-school student is a Sikh, and he is accused of using his *kirpan*, a small dagger and an important article of devotion in the Sikh faith, to threaten two classmates.<sup>2</sup> The boy's criminal trial, which resumed in February 2009, has reignited a controversy that seemed resolved in 2006, when the Supreme Court of Canada declared that a Sikh student has the right to wear a *kirpan* in a public school.<sup>3</sup> This criminal case, involving a student from the very same school district named as a party to 2006 civil suit, demonstrates that for some in the Canadian public, questions raised by the clash of religious articles and public security remain unanswered.<sup>4 5</sup>

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<sup>1</sup> *Trial begins for Que. boy accused of using Kirpan as weapon*, VANCOUVER SUN, Oct. 29, 2008, available at <http://www.canada.com/vancouversun/news/story.html?id=b3ed0e35-a7fa-4ae2-960a-90d33b524a03> (last visited Feb. 28, 2009) [hereinafter *Que. boy accused*].

<sup>2</sup> *Id.*

<sup>3</sup> CTV.ca: *Teen charged in kirpan case denies wrongdoing*, Feb. 9, 2009, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20090209/kirpan\\_case\\_090209/20090209?hub=Canada](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20090209/kirpan_case_090209/20090209?hub=Canada) (last visited Feb. 27, 2009) [hereinafter *Teen charged in kirpan case*]; see *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.).

<sup>4</sup> See Henry Aubin, *Kirpan incident raises questions about court ruling*, <http://www2.canada.com/montrealgazette/news/editorial/story.html?id=c6135308-4ace-4944-921c-652650424188> (last visited Jan. 31, 2009).

<sup>5</sup> The criminal case is expected to be resolved by a judicial decision on April 15, 2009. *Teen charged in kirpan case*, *supra* note 3. However, it is evident that this will do little to end the current controversy surrounding the issue of the *kirpan* in Canadian public schools, or the broader issue of the accommodation of controversial religious articles by the Canadian public or legal system. See *The kirpan and Montreal's assault case against a Sikh youth*, Sept. 28, 2008, <http://thelangarhall.com/archives/593> (last visited Feb. 27, 2009) (questioning the efficacy of

The right to religious expression is commonly considered to be fundamental, and is generally defined to include both the right to wear religious clothing and the right to display religious symbols publicly. The turban and *kirpan* are two articles of the Sikh faith that have been the focus of prominent debate within the area of religious freedom.<sup>6</sup> The *hijab*, a head scarf worn by Muslim women, has been the subject of controversy internationally, particularly since the terrorist attacks of September 11, 2001.<sup>7</sup>

The Canadian courts have generally approached these and other religious symbols with deference to neutrality and religious tolerance.<sup>8</sup> The focus of the courts has been on the state as a secular entity, with no preference for (or against) a particular creed, practice, or form of religious expression.<sup>9</sup> However, in terms of religious expression in the public sphere, some perceive neutrality as productive of a conflict between the right to expression and public safety concerns that poses a

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court decisions or legal action on public accommodation of minority religious values, referring to the *kirpan* in particular).

<sup>6</sup> Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to this Article of Faith*, 9 RUTGERS J. L. & RELIGION 10 (2008).

<sup>7</sup> Allison N. Crawford, *Learning Lessons from Multani: Considering Canada's Response to Religious Garb Issues in Public Schools*, 36 GA. J. INT'L. & COMP. L. 159, 160 (2007).

<sup>8</sup> See *infra* Part III.A-B (discussing numerous Canadian court cases in which the question of safety and security and religious expression has been addressed).

<sup>9</sup> *Id.*

problem for the Canadian courts.<sup>10</sup>

This comment will address the Canadian courts and analyze their approach in considering safety and security concerns as a justification for the abridgment of religious freedoms. Its purpose is to consider the current state of religious freedom in Canada with respect to these concerns, propose that a clear and more consistent approach is necessary for the application of this justification, and articulate such an approach that is also consistent with the apparent preferences of the Canadian courts and the nation's valued interest in protecting religious freedom.

## II. FREEDOM OF RELIGIOUS EXPRESSION GENERALLY

### A. *International Recognition of Religious Freedom*

A guaranteed right to religious expression and practice has developed into an essential aspect of a modern liberal democracy, such that it is often taken for granted by the citizens of any modern democratic society. The Universal Declaration of Human Rights (“UDHR”), the list of recognized rights adopted by the United Nations in 1948 in response to the atrocities perpetrated by Nazi Germany during World War II, is considered to be the primary international

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<sup>10</sup> See *infra* Part IV.C.1 (discussing some of the attitudes that have been expressed by members of the Canadian public, some of which regard deference to freedom of religious expression as problematic in cases in which the expression presents a potential conflict with other values, particularly security in the public realm).

articulation of guaranteed rights.<sup>11</sup> UDHR Article 18 makes “freedom of thought, conscience and religion” a priority.<sup>12</sup> The United Nations Human Rights Committee (“UNHRC”) has declared that this broad freedom encompasses the right to express any belief or no belief at all, and the right to wear religious clothing and display religious symbols.<sup>13</sup> By including these as explicit human rights, the United Nations has acknowledged that modern legal systems and governments have a duty not only to recognize these rights as fundamental, but also to protect and uphold them.<sup>14</sup>

The sentiments implicit in the UNHRC’s conception of religious freedom are generally agreed-upon concepts within the free world, and are met with little dissent in liberal democratic nations. However, despite general agreement about the essential nature of these rights, some questions concerning their appropriate

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<sup>11</sup> The Universal Declaration of Human Rights Drafting and Adoption: Standard of Achievement, <http://www.uhdr.org/history/overview.htm> (last visited Oct. 26, 2008).

<sup>12</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at art. 18, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948).

<sup>13</sup> Human Rights Committee, General Comment 22, Article 18, CCPR/C/21/Rev. 1/Add 4 (20 July 1993), para. 1,2,4.

<sup>14</sup> Beverly McLachlin, *Freedom of Religion and the Rule of Law*, in *RECOGNIZING RELIGION IN A SECULAR SOCIETY* 12, 13 (Douglas Farrow ed., McGill-Queens University Press, 2004).

reach and proper application remain unanswered.<sup>15</sup> This may be because traditional ideas about freedom of expression and the non-establishment of any single or official state religion are composed of a broad variety of values.<sup>16</sup> Even while noting that the right is “far-reaching and profound,” the UNHRC permits limitation of the freedom for the purposes of safety, order, health, morals, or the protection of the rights of others.<sup>17</sup>

*B. Non-Western Religious Practice in the Post-9/11 Western World*

In recent years, the concept of religious freedom has taken on new implications internationally, primarily due to the September 11, 2001 terrorist attacks against the United States. The public response to the attacks, particularly within the United States, has been marked by violence against persons who practice (or even appear to practice) Middle Eastern religions.<sup>18</sup> Following September 11, the prominent image of Osama bin-Laden provided a link between

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<sup>15</sup> See *infra* Part III.A (discussing the possibility of placing limitations on these rights, with specific attention to Canada).

<sup>16</sup> KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 1* (Princeton University Press, 2006).

<sup>17</sup> Human Rights Committee, *supra* note 13, para. 1, 8.

<sup>18</sup> Gohil & Sidhu, *supra* note 6 (noting that Sikhs in America have been the victims of racially-motivated violence, with particular attention paid to the turban as a target for those who perceive the religious article as being associated with terrorism).



terrorism and Middle-Eastern traditions, particularly the turban.<sup>19</sup> During the days and weeks immediately following the attacks, a substantial number of hate crimes were perpetrated against Sikh men, often for no apparent reason other than the perception of the turban as a Middle Eastern symbol,<sup>20</sup> and despite the fact that the vast majority of Sikhs are not of Middle Eastern descent.<sup>21</sup> That the turban is viewed as indicative of terrorism or as a symbol of terrorist acts has had a profound effect on Sikh men in particular, though no known connection existed between those responsible for the terrorist attacks and the Sikh faith.<sup>22</sup>

Just as the turban has been the subject of post-September 11 hatred and fear within the United States,<sup>23</sup> it and other distinctly Middle Eastern or non-Christian

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<sup>19</sup> Mark Stromer, *Combating Hate Crimes Against Sikhs: A Multi-Tentacled Approach*, 9 J. GENDER RACE & JUST. 739, 740 (2006).

<sup>20</sup> *Id.*

<sup>21</sup> The vast majority of Sikhs in the world are found in India, with a very small percentage living in Middle Eastern countries. *See* Wikipedia: Sikhism by country, [http://en.wikipedia.org/wiki/Sikhism\\_by\\_country](http://en.wikipedia.org/wiki/Sikhism_by_country).

<sup>22</sup> Gohil & Sidhu, *supra* note 6.

<sup>23</sup> This assessment of the attitudes expressed by a portion of the United States population and the effect that they have had on the Muslim population and on the country in general finds support in changes in the political and social discourse within the nation, as well as in the general experiences of members of the Muslim community within the United States. *See* United States Institute of Peace Special Report, *The Diversity of Muslims in the United States, Views as Americans*, 2, available at <http://www.usip.org/pubs/specialreports/sr159.pdf> (discussing the “range of challenges” faced by Muslim Americans since September 11, 2001, and how various social and political Muslim organizations have responded to these challenges); *see also* Kathleen Peratis, *Discrimination By Any Other Name*, Feb. 28, 2008, available at

religious clothing and imagery have remained controversial throughout the Western world.<sup>24</sup> Some European nations have responded to these controversies, and to the perceived threat that terrorism poses to national security, with statutes that seek to promote a general sense of safety by limiting religious freedoms.<sup>25</sup>

### III. THE CANADIAN CONCEPTION OF RELIGIOUS FREEDOM

Canada, like most nations formed through a tradition of immigration, takes a stance of religious neutrality in order to accommodate a variety of religious views and practices.<sup>26</sup> The Constitution of Canada includes a Charter of Rights and Freedoms, which grants the freedoms of conscience and religion.<sup>27</sup> However, it is notable that, unlike the United States Constitution, the Constitution of Canada

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<http://www.forward.com/articles/12788/> (discussing a sharp increase in the number of complaints of discrimination against Muslims reported by the Equal Employment Opportunity Commission in the years following the September 11 attacks, particularly the large number of those labeled as “9/11 backlash” complaints, which have “come about as a direct result of September 11”).

<sup>24</sup> See *infra* Part IV.B.1 (discussing the French approach to distinctly religious clothing, particularly Middle-Eastern religious head coverings).

<sup>25</sup> Silvio Ferrari, *Individual Religious Freedom and National Security in Europe After September 11*, 2004 B.Y.U. L. REV. 357, 362 (2004); See also *infra* Part IV.B.1 (focusing on the policies of France in particular).

<sup>26</sup> Library of Parliament, Freedom of Religion and Religious Symbols in the Public Sphere, <http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm> (last visited Oct. 26, 2008) [hereinafter Library of Parliament].

<sup>27</sup> Canadian Constitution Act, Part I, § 2(b).

does not declare an official policy of separation of church and state.<sup>28</sup> The preamble to the Charter of Rights and Freedoms states that the nation officially recognizes “the supremacy of God and the rule of law.”<sup>29</sup> However, it is generally agreed that this reference to God is purely symbolic, and there is no suggestion that this phrase alters or negates the religious freedom guaranteed in other portions of the Charter.<sup>30</sup>

Unlike that of many liberal democracies, Canada’s current conception of freedom of religion (that found in the relatively recent Charter of Rights and Freedoms) developed after the modern liberal conception of religious freedom.<sup>31</sup> As such, the Canadian courts have considered this right with the understanding that it is fundamental; thus, they have grappled with the question of how to best conceive of and guarantee religious freedom, rather than the question of whether such freedom ought to be recognized in the first place.<sup>32</sup> It is suggested that the Canadian courts have formed a conception of religion that is consistent with the

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<sup>28</sup> Library of Parliament, *supra* note 26.

<sup>29</sup> Canadian Constitution Act, Part I.

<sup>30</sup> *See e.g.* Library of Parliament, *supra* note 26.

<sup>31</sup> *See* McLachlin, *supra* note 14, at 16.

<sup>32</sup> *Id.* at 16-17.

principles of the Charter of Rights and Freedoms, and that is shaped not only by the specifics of each case, but also by the prevailing legal culture with respect to the appropriate application of fundamental rights.<sup>33</sup> In *Syndicate Northcrest c. Amselem*,<sup>34</sup> the Supreme Court of Canada articulated a broad definition of “religion.” In that case, the Court stated that religion “generally involves a...system of faith and worship” and is about “personal convictions or beliefs...integrally linked to one’s self-definition and spiritual fulfillment.”<sup>35</sup> The Court noted that religious practices are to be understood as acts that serve to connect one with the object of his or her faith.<sup>36</sup> That this conception of religion is largely focused on the individual believer, rather than on the faith community as a whole, suggests that the Canadian Court views religion as an individual phenomenon.<sup>37</sup> Under this assessment, considerations about safety and security as justifications for abridging religious freedoms are considered in terms of the effect that deprivation of the right might have on the individual right-holder, rather than

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<sup>33</sup> See Benjamin L. Berger, *Law’s Religion: Rendering Culture*, 45 OSGOODE HALL L. J. 277, 282 (2007).

<sup>34</sup> [2004] 2 S.C.R. 551 (Can.).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Berger, *supra* note 33, at 284-85.

in terms of the effect that it may have on the greater religious community or the public as a whole. In this sense, the Court's view is compatible with a conception of fundamental rights as being held by the individual against the state, as opposed to by all citizens collectively against the state.<sup>38</sup>

It is notable that the province of Quebec has developed its own Charter of Human Rights and Freedoms,<sup>39</sup> which also contains a right to freedom of religion.<sup>40</sup> Further, the Quebec Charter provides that in exercising rights, "a person shall maintain a proper regard for...the general well-being of the citizens of Quebec."<sup>41</sup> Thus, though Quebec maintains its own articulation of fundamental rights, this articulation is not substantially different from that of the rest of the nation, and also clearly permits abridgment of the right in order to protect the public.<sup>42</sup>

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<sup>38</sup> *Id.* at 284.

<sup>39</sup> Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12.

<sup>40</sup> *Id.* at § 3.

<sup>41</sup> *Id.* at § 9.1.

<sup>42</sup> However, there is some indication that the public and representatives of Quebec have been more willing to place limitations on recognized rights, or at least to choose to recognize religion in a different way than other Canadian provinces might. *See infra* note 180 (discussing steps taken to change the teaching of religion in Quebec public schools by eliminating optional classes on particular religions in favor of mandatory classes which require students to consider all belief systems).

### A. *Placing Limitations on Religious Freedom in Canada*

The Supreme Court of Canada has articulated its understanding of the religious freedom guaranteed by the Charter of Rights and Freedoms most clearly in the case of *R. v. Big M Drug Mart Ltd.*<sup>43</sup> In *Big M*, which is regarded as the first significant case concerning the religious freedom expressed in the Charter,<sup>44</sup> the Court considered the Lords Day Act.<sup>45</sup> The Act, which prohibited all businesses from opening on Sundays, was challenged on grounds that it violated the religious rights of non-Christian business owners who recognized a Sabbath day other than Sunday.<sup>46</sup> The Court held that the Lord's Day Act was a violation of these rights because it clearly did not have a secular purpose, as it was enacted purely in order to observe the Christian Sabbath.<sup>47</sup> In declaring the Act unconstitutional, the Court

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<sup>43</sup> [1985] 1 S.C.R. 295 (Can.).

<sup>44</sup> Berger, *supra* note 33, at 284.

<sup>45</sup> The Lord's Day Act is one example of a Canadian "blue law." A blue law is "a type of law...designed to enforce moral standards, particularly the observance of Sunday as a day of worship or rest." These laws have typically been enacted in the United States and Canada, and most have either been repealed or are no longer enforced due to considerations like those articulated by the Canadian Court in *Big M*. Nationmasters Encyclopedia, "Blue Law", <http://www.nationmaster.com/encyclopedia/Blue-law> (defining "blue law," and discussing the application and current state of this legislation).

<sup>46</sup> Human Rights in Canada, "Open on Sunday: Revoking the Lord's Day Act," <http://www.chrc-ccdp.ca/en/timePortals/milestones/116mile.asp> (last visited Oct. 26, 2008).

<sup>47</sup> *Big M.*, [1985] 1 S.C.R. 295 (Can.).

discussed both the scope of religious freedom under the Charter of Rights and Freedoms, and the justifications that the state may rely upon to impose limitations on that freedom.<sup>48</sup> The Court defined religious freedom as the right to declare any belief openly, but also as the absence of coercion or restraint in terms of belief.<sup>49</sup> The Court added that the freedom is subject to “such limitations as are necessary to protect public safety, order, health, or morals” or to protect the rights of others.<sup>50</sup> Thus, with *Big M*, the Canadian Supreme Court has explicitly acknowledged that safety is an appropriate justification for placing limitations on religious freedom under Canadian law.

### *B. Safety Concerns Posed by Religious Clothing and Symbols*

The safety and security justification has been discussed in numerous instances, most prominently, with respect to religion, in cases involving articles of clothing with distinctly religious significance and the reactions that they receive in the public sphere.<sup>51</sup> That these articles are so often related to Middle Eastern

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See infra* Part III.B.1 (discussing religious head coverings, particularly the *hijab* and the turban, and the *kirpan*, and the safety and security concerns that are commonly linked to these religious articles in the public sphere).

religions (or, as with Sikh articles, commonly *perceived* to be related to Middle Eastern religions) links much of the current debate about religious expression and symbolism to post-September 11 sentiments, and to the idea that minority religions are more often targeted by limitations of religious expression.<sup>52</sup> Muslims and Sikhs comprise a relatively small percentage of Canada's population, with less than 2% of citizens identifying as Muslim, and less than 1% identifying as Sikh in the 2001 Canadian Census.<sup>53</sup> Thus, these two religions, both of which prescribe articles of religious garb which have been the subject of controversy, can clearly be considered minorities in Canada.

The *hijab*, a head-covering worn by Muslim women, has been the subject of international discussion and debate due to bans on this article in some European nations, particularly France.<sup>54</sup> The *hijab*, meaning "a veil," is an unquestionably

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<sup>52</sup> See Eric Michael Mazur, *Minority religions and limitations on religious freedom*, available at [http://findarticles.com/p/articles/mi\\_hb6541/is\\_3\\_66/ai\\_n28913669](http://findarticles.com/p/articles/mi_hb6541/is_3_66/ai_n28913669) (discussing the impact of limitations on religious minorities in the United States, and suggesting that these groups are forced to make choices, between the requirements of American society and their own religious tenets, which more dominant groups are not).

<sup>53</sup> Canada Census: Population by Religion, <http://www40.statcan.gc.ca/l01/cst01/demo30a-eng.htm> (last visited Nov. 23, 2008).

<sup>54</sup> Human Rights Watch, *France: Headscarf Ban Violates Religious Freedom*, <http://www.hrw.org/english/docs/2004/02/26/france7666.htm> (last visited Oct. 26 2008).



religious garment, as it is explicitly advised by the Qur'an.<sup>55</sup> The Sikh turban, or *keski*, is a head covering worn by Sikh men.<sup>56</sup> The Sikh *kirpan* is a small dagger worn strapped near the waist of an initiated Sikh.<sup>57</sup> Both of these items are worn in accordance with the *Sikh Reht Maryada*, a religious code of conduct, and are thus requirements of the Sikh faith.<sup>58</sup> The *kirpan*, in particular, is widely recognized as essential to the Sikh faith; in fact, one American judge has stated that "to be a Sikh is to wear a *kirpan* -- it is that simple."<sup>59</sup> The turban and *kirpan* are two of the five *Kakars* of Sikhism,<sup>60</sup> along with the *kachh* (special underwear), the *karha* (a steel bracelet), and the *kanga* (a comb).<sup>61</sup> Like the Muslim *hijab*, both the turban and the *kirpan* have been subjects of discussion and controversy concerning safety and

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<sup>55</sup> Islam for Today, Women in Islam: Hijab, <http://www.islamfortoday.com/syed01.htm> (last visited Oct. 26, 2008).

<sup>56</sup> The Turban of The Sikhs, [http://www.singhsabha.com/sikh\\_turban.htm](http://www.singhsabha.com/sikh_turban.htm) (last visited Oct. 26, 2008).

<sup>57</sup> The Sikh Coalition, Kirpan: The Sikh Sword, <http://www.sikhcoalition.org/InfoKirpan.asp> (last visited Oct. 26, 2008).

<sup>58</sup> *Sikh Reht Maryada*, § 6, chapter 8, art. 24(d).

<sup>59</sup> *State v. Singh*, 690 N.E.2d 917, 920 (1996) (Judge Painter, concurring).

<sup>60</sup> The "five *Kakars* of the Sikhism" refers to five items that a Sikh must wear at all times after *Armit*, a baptism ceremony. Because the name of each of the *Kakars* begins with the letter "k", they are commonly referred to as "the five K's." Sukhmandir Khalsa, *What are the five K's? Kakars the Five Required Articles of Sikh Faith*, <http://sikhism.about.com/od/introductiontosikhism/tp/Kakars.htm>.

<sup>61</sup> The Turban of the Sikhs, *supra* note 56.

security in the public sphere, and the implications that security concerns have in the law of fundamental rights.

In light of a perceived erosion of the rights of minority religions, the Canadian courts have generally attempted to err on the side of permitting public displays of religious clothing and symbols, even in light of legitimate safety concerns.<sup>62</sup> However, the courts have at times diverged from this general rule to permit the abridgement of the otherwise highly valued right to wear religious clothing and display religious symbols.

1. *Safety concerns involving religious head coverings*<sup>63</sup>

Concerns about safety and security are rarely present in cases concerning bans on the *hijab*, as there is little reason to believe that the head scarf poses a direct safety threat. However, the issue was addressed by the Quebec Human

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<sup>62</sup> Library of Parliament, *supra* note 26.

<sup>63</sup> With respect to religious head coverings, this article's primary concern is with those associated with Middle-Eastern religions, such as the turban. Though the topic of safety and security concerns implied by other religious head coverings, such as the Jewish yarmulke, is of value, there is apparently far less incidence of such concerns. This may be due to the religion-based fears that seem to be commonly associated with Middle-Eastern religions in the Western context. In fact, there is evidence to suggest that extremely similar religious head coverings will invoke discriminatory responses when worn by members of Middle-Eastern religions, but not when worn by others. *See* Peratis, *supra* note 23 (noting that the United States has had no reports of workplace discrimination involving the yarmulke in recent years, but several involving the Muslim *kufis*, a very similar head covering).

Rights Commission<sup>64</sup> after two Muslim girls were expelled from a Quebec school for wearing the head coverings and brought a formal complaint.<sup>65</sup> This followed similar incidents in schools throughout Europe, suggesting that a formal response to what some viewed as discrimination against a religious minority was necessary.<sup>66</sup> In its non-binding report, the Quebec Human Rights Commission stated that prohibition of the *hijab* is a violation of the rights to freedom of religion and freedom of education, and, in a later report, that schools must reasonably accommodate Muslim students.<sup>67</sup> However, the Quebec Commission did note that the right to wear a *hijab* may be limited in any case in which it is found to pose a legitimate risk to personal safety.<sup>68</sup> So, though this justification has not yet been applied to head scarf prohibitions in Canadian public schools, this Commission has explicitly validated legitimate safety concerns as a proper justification for

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<sup>64</sup> The Quebec Human Rights Commission is a government body, operating in connection with the Canadian Human Rights Commission, and acting under the Canadian Human Rights Act, with authority to “investigate and try to settle complaints of discrimination in employment and in the provision of services within federal jurisdiction.” Canadian Human Rights Commission, *About Us*, <http://www.chrc-ccdp.ca/about/default-en.asp>.

<sup>65</sup> R. Brian Howe & Katherine Covell, *Schools and the Participation Rights of the Child*, 10 EDUC. & L. J. 107, 116 (2000).

<sup>66</sup> Library of Parliament, *supra* note 26.

<sup>67</sup> Howe & Covell, *supra* note 65.

<sup>68</sup> Library of Parliament, *supra* note 26.

imposing such limitations on this otherwise guaranteed right.

As the Quebec Human Rights Commission reports suggest, the general trend in Canadian law has been to uphold and protect the right to wear religious head coverings, even in cases in which legitimate safety concerns are apparent.<sup>69</sup> In *Dhillon v. British Columbia (Ministry of Transportation & Highways)*,<sup>70</sup> the British Columbian Human Rights Tribunal<sup>71</sup> considered the rights of Sikh men to be exempted from laws mandating the wearing of a helmet when riding a motorcycle on grounds that obeying the law would impair the ability to wear a religiously-mandated turban.<sup>72</sup> As an independent legal entity, the Columbian Human Rights Tribunal is not bound by the precedents of the Supreme Court of Canada. In *Dhillon*, the Columbian Tribunal held that the right to wear religious clothing, including the Sikh turban, outweighs the safety concerns involved, even though

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<sup>69</sup> See *Dhillon v. British Columbia (Ministry of Transportation & Highways)*, [1999] 35 C.H.R.R. D/293 (Can.) (in which the court discusses a balancing test, weighing safety risks against religious rights).

<sup>70</sup> [1999] 35 C.H.R.R. D/293 (Can.).

<sup>71</sup> Like the Quebec Human Rights Commission (note 57), the British Columbian Human Rights Tribunal is an independent, “quasi-judicial” body. Its primary purpose is to resolve legal issues through mediation and hearings. British Columbian Human Rights Tribunal, <http://www.bchrt.gov.bc.ca/> (last visited Nov. 23, 2008).

<sup>72</sup> *Dhillon*, [1999] 35 C.H.R.R. D/293 (Can.).

doing so makes a “high risk activity” into a “higher risk activity.”<sup>73</sup> In *Dhillon*, the safety risk was considered to be permissible primarily because it is the un-helmeted Sikh who chooses to bear the risk of the activity in order to fulfill his religious obligations.<sup>74</sup> Based upon this analysis, which focuses in large part on considerations about who bears the safety risk created by religious expression, greater deference is given to the interests of religious freedom when the safety risk involved is exclusively to the individual who is exercising the right,<sup>75</sup> as opposed to situations in which other members of the public are placed in harm’s way by the exercise.

Despite the British Columbian Human Rights Tribunal’s analysis in *Dhillon*, the Supreme Court of Canada had previously applied a different line of thinking when dealing with a similar issue in *Bhinder v. Canadian National Railway*.<sup>76</sup> In *Bhinder*, the Court considered whether an employer may legally demand that employees take safety precautions that interfere with the employee’s religious

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *But see* The Star, Opinion, Should Religion Prevail Over Public Safety?, <http://www.thestar.com/comment/article/304063> (last visited Jan. 30, 2009) (noting the view of some citizens that the un-helmeted rider poses a risk to all tax-paying citizens, because, in the case of a non-fatal accident, medical care will be paid for by the government).

<sup>76</sup> [1985] 2 S.C.R. 561 (Can.).

practices; in this case, the employer had a required that Sikh men remove their turbans in order to comply with a policy requiring a helmet to be worn properly.<sup>77</sup> Bhinder, a Sikh man who was employed as an electrician by the National Railway, had refused to wear the requisite helmet, claiming that it was a violation of his religion to wear anything but a turban on his head.<sup>78</sup> Here, the Court considered the perimeters of discrimination as discussed in the Canadian Human Rights Act.<sup>79</sup> Section 15(1)(a) of the Act states that an employer's action is not considered to be discrimination if it is "based on a bona fide occupational requirement."<sup>80</sup> The Court defined such a requirement as one that is "imposed honestly, in good faith" and for the sake of "all reasonable dispatch, safety, and economy."<sup>81</sup> Based upon this definition, the Court determined that the helmet requirement in this case was such a bona fide occupational requirement, and was therefore a permissible limitation on Bhinder's freedom to wear religious clothing.<sup>82</sup> Unlike the British

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Canadian Human Rights Act, Chapter H-6, Section 15(a).

<sup>81</sup> Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202 (Can.).

<sup>82</sup> *Bhinder*, [1985] 2 S.C.R. 561 (Can.).

Columbian Human Rights tribunal in *Dhillon*, the Court in *Bhinder* did not consider that the employee alone would bear the burden of the safety risk that would be created by allowing an exception to the policy requiring a helmet.

## 2. *Safety concerns involving the kirpan*

The Canadian courts have generally viewed the *kirpan* as a protected symbol of faith, like the *hijab* and turban, with some notable exceptions. Numerous lower court decisions have discussed the controversial issue of the *kirpan* in public schools. The discussions have typically determined that the safety threat posed by the small dagger is low relative to the impact of the abridgment of religious freedom that would be required to uphold a ban on the *kirpan*.<sup>83</sup> In *Multani v. Commission scolaire Marguerite-Bourgeoys*,<sup>84</sup> the Supreme Court of Canada considered the issue of the *kirpan* in public schools. Here, a school board's decision to forbid the wearing of the ceremonial dagger by Sikh students clashed with the right of free religious expression.<sup>85</sup> The school board's reasoning was that, despite its obvious religious significance to Sikh students, the *kirpan* is a weapon, and is therefore banned by the schools' general prohibition of all

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<sup>83</sup> Crawford, *supra* note 7, at 164.

<sup>84</sup> [2006] 1 S.C.R. 256 (Can.).

<sup>85</sup> *Id.*

weapons.<sup>86</sup> Considering this rationale, the Court stated that the *kirpan* should not, in fact, be considered a weapon when it is properly worn by a member of the Sikh faith who recognizes it as having real religious value; rather, in such a case, it is above all else a religious symbol with the characteristics of a weapon, and thus, is not a weapon in the conventional sense.<sup>87</sup> The Court also noted that this limitation on the student's religious freedom affected another right as well: the student's right to public education, as he was forced to attend a private school after being expelled for wearing the *kirpan*.<sup>88</sup> The Court's declaration that, in order for a constitutional right to be limited on the basis of concerns about safety, those concerns must be "unequivocally established," was essential to its discussion in *Multani*.<sup>89</sup> The *Multani* decision was met with mixed reactions by the Quebec public, with some questioning how far it may reach in allowing a larger variety of otherwise

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* It is worth noting that the Court in *Multani* is not alone in this assessment of the *kirpan* as a religious item rather than a weapon, as this sentiment has since been expressed by citizens. See *Kirpan case resumes after long delay*, MONTREAL GAZETTE, Feb. 16, 2009, available at <http://www.montrealgazette.com/health/Kirpan+case+resumes+after+long+delay/1260933/story.html> (in which a police officer makes a very similar comment while discussing the arrest of a young Sikh who has allegedly threatened classmates with his *kirpan*, saying, "I saw it as a religious item and they saw it as a knife").

<sup>88</sup> *Multani*, [2006] 1 S.C.R. 256 (Can.).

<sup>89</sup> *Id.*



prohibited items in schools.<sup>90</sup>

With *Multani*, the Court articulated a general rule to follow to determine whether a legitimate safety or security concern exists for the purpose of limiting religious freedoms -- that, for these purposes, a legitimate safety concern is one that is “unequivocally established”<sup>91</sup> -- but did not articulate any standard for applying this justification. Further, the future applicability of this rule to cases involving the *kirpan* in public schools is currently uncertain. The criminal charges against the Sikh student arrested on September 11, 2008 for allegedly threatening two classmates with a *kirpan*<sup>92</sup> are viewed by some as an indication that the *Multani* decision has not garnered any real acceptance among members of the

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<sup>90</sup> Jeff Heinrich, *Muslim, Jewish groups hail top court's kirpan ruling*, MONTREAL GAZETTE, Mar. 4, 2006, available at <http://www.canada.com/montrealgazette/news/stroy.html?id=544e852a-a70c-4938-b180-2a6b9a9307fa> (last visited Oct. 26, 2008).

<sup>91</sup> *Multani*, [2006] 1 S.C.R. 256 (Can.).

<sup>92</sup> See *infra* Part I (discussing this case as a recent example of the controversy surrounding the *kirpan* in the public sphere). See also World Sikh News, Quebec Sikh boy's case focuses on kirpan judgment, <http://www.worldsikhnews.com/1%20October%202008/Quebec%20Sikh%20boy%20case%20focusses%20on%20kirpan%20judgment.htm> (last visited Oct. 26, 2008); But see The Panthic Weekly: Fabricated Kirpan Case Haunts Sikh Community Two Years Later, Feb. 13, 2009, at <http://www.panthic.org/news/123/ARTICLE/4747/2009-02-13.html> (drawing a corollary between this case and another in which a Sikh was falsely accused of carrying the *kirpan* as a weapon, suggesting that the accusations are the result of xenophobia within the non-Sikh community, and noting one attorney's belief that this Sikh teenager has been “framed”).

Canadian public school systems or the Canadian public in general.<sup>93</sup> The student pled not guilty to all counts,<sup>94</sup> though a finding of his guilt or innocence will evidently do little to settle the controversy over religious expression in public schools.<sup>95</sup> Interestingly, this case involves the Marguerite Bourgeoys school board, the same board that lost its case in front of the Supreme Court of Canada in *Multani*.<sup>96</sup> Whether a conviction of this student will be accepted as dispositive proof of the legitimacy of safety concerns involving the *kirpan* in public schools is unclear, though some have expressed the view that this incident threatens to set back the progress made by the Court with the *Multani* decision.<sup>97</sup>

While the *kirpan* has been a controversial (though generally allowed) religious symbol when present in Canadian public schools, Canadian courts have discussed this article in other contexts as well. The *kirpan* is routinely barred from airplanes with little dissent, on the grounds that an airplane is a special environment in which the abridgement of religious freedom is justified in light of

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<sup>93</sup> SikhNet, Sikh boy denies threatening classmates, <http://www.sikhnet.com/voices/sikh-boy-denies-threatening-classmates> (last visited Oct. 26, 2008).

<sup>94</sup> *Que boy accused*, *supra* note 1.

<sup>95</sup> *See infra* Part I (discussing how the controversy over the *kirpan* in public schools has been reignited by this case).

<sup>96</sup> *Que boy accused*, *supra* note 1.

<sup>97</sup> *See e.g.* Aubin, *supra* note 4.

substantial security concerns.<sup>98</sup> Using reasoning similar to that of the Court in *Multani*, the British Columbian Court of Appeals has upheld the right of a Sikh to wear a *kirpan* in a public hospital in which weapons are otherwise prohibited.<sup>99</sup> Here, the Court of Appeals discussed the issue not only as a matter of freedom of religion, but also as a matter of the right to medical services and accommodation under British Columbia's Human Rights Act.<sup>100</sup> As a matter of public policy, the *kirpan* is also allowed in the Canadian House of Commons when worn by Sikh members of Parliament, or even by members of the public in the visitors' gallery.<sup>101</sup>

However, in a decision seemingly contrary to the same public policy that allows the *kirpan* in the House of Commons, one Court of Appeals has stated that judges have a right to ban the *kirpan* from the courtroom.<sup>102</sup> In *R. v. Hothi*, the Manitoba Court of Appeals stated its belief that the *kirpan* is not a weapon, but held that a judge has discretion to make his or her own determination about

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<sup>98</sup> Library of Parliament, *supra* note 26.

<sup>99</sup> British Columbia (Worker's Compensation Board) v. British Columbia (Council of Human Rights), (1990), 70 D.L.R. (4th) 720 (Can.).

<sup>100</sup> *Id.*

<sup>101</sup> See Mangalorean, Sikh with kirpan not allowed to enter Canadian court, <http://mangalorean.com/news.php?newstype=local&newsid=64342> (last visited Oct. 26, 2008); Library of Parliament, *supra* note 26.

<sup>102</sup> *R. v. Hothi*, [1986] 3 W.W.R. 671 (Can.).

whether the article is barred by a prohibition of weapons in the courtroom.<sup>103</sup>

Here, the essential inquiry in this case was not whether the *kirpan* is to be considered a weapon for the purposes of such prohibitions, but rather, who should have the discretion to make this determination. Here, it was decided that a judge has discretion to decide what is or is not a weapon, and may, therefore, ban *kirpans* from the courtroom.<sup>104</sup> This decision makes a firm statement about the policy of granting a large amount of deference to a judge on the matter of what goes on within the courtroom. However, a recent instance of a Sikh being barred from testifying at a trial in Calgary for refusing to remove his *kirpan* has put the issue of the *kirpan* in the courtroom back in the public eye,<sup>105</sup> and has demonstrated that, much like the debate over the *kirpan* in public schools, court decisions have done little to settle this controversy.

#### IV. ANALYSIS

Under Section 1 of Canada's Charter of Rights and Freedoms, reasonable

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> NRI: Kirpan not allowed in Canadian court, <http://citizensalliance.wordpress.com/2008/01/18/nri-kirpan-not-allowed-in-canadian-court/> (last visited Oct. 26, 2008).

and justified limitations on fundamental freedoms are permitted.<sup>106</sup> Though this provision does make clear that limitations upon rights are permissible, there is little in the Charter or in the Canadian case law to suggest what these limitations are or when they are appropriate. A common view of this section is that it suggests that the listed rights are absolute, except in the sense that limitations are the only appropriate means of rectifying situations in which rights conflict with each other.<sup>107</sup> However, this view has been criticized for being overly-limited, as it focuses on a single theory of rights as individualistic only, and is thus insufficient to address a pluralistic culture such as that found in Canada.<sup>108</sup> Another view regards this provision as superfluous, as limitations are (or should be) considered implicit in or “internal” to any enumeration of rights, by virtue of the fact that recognized rights will always conflict with each other or with other recognized values at some point, and will thus always necessitate some form of limitation.<sup>109</sup>

Section 33 of the Charter of Rights and Freedoms, which has been described

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<sup>106</sup> Canadian Constitution Act, Part I, § 1.

<sup>107</sup> See e.g. JANET L. HIEBERT, *LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW* 36 (McGill-Queen’s University Press, 1996).

<sup>108</sup> *Id.* at 39.

<sup>109</sup> *Id.* at 42.

as a “loophole” that is “unique in the world,”<sup>110</sup> apparently allows the Canadian government or the legislature of any Canadian province to opt-out of the fundamental freedoms and rights outlined in the Charter through legislative action.<sup>111</sup> According to section 33, often called the “notwithstanding” clause, any legislative “act or provision” which infringes upon these rights may, by the Charter’s own terms, supersede them.<sup>112</sup> This provision of the Charter seems to enable broad abridgment of otherwise guaranteed rights for virtually any justification which the legislature feels is appropriate.<sup>113</sup>

*A. The Tendencies of the Canadian Courts in Approaching Limitations to Religious Freedoms*

The Supreme Court of Canada has discussed the proper role of limitations on recognized rights, but this discussion leaves many unanswered questions. In *R.*

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<sup>110</sup> Church and State Separation in Canada, [http://www.religioustolerance.org/sep\\_cs\\_can.htm](http://www.religioustolerance.org/sep_cs_can.htm) (last visited Nov. 23, 2008); *See also infra* Part IV.C.2.

<sup>111</sup> □ Canadian Constitution Act, Part I, § 33.

<sup>112</sup> □ *Id.*

<sup>113</sup> But see Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 24, available at <http://ccc.uchicago.edu/docs/StateAction.pdf>, describing this provision as a means by which the Charter “makes it possible for legislatures to respond to judicial interpretations of the Charter by enacting legislation predicated on a different view of the judicial review.” Here, Tushnet suggests that the “notwithstanding” clause is a mechanism to aid in the facilitation of guaranteed rights by promoting a dialogue between the various branches of the judicial system, rather than a loophole for disregarding them at the whim of the legislature.

*v. Oakes*,<sup>114</sup> the Court articulated a two-pronged test, stating that (1) any limitation upon fundamental rights must have an objective that is of substantial and pressing concern to a free democratic society, and that (2) any measure taken to impose the limitation must be proportional to that stated objective. This test does demonstrate that the Court accepts the idea that freedom of religion is not absolute, but it does not go far in articulating the specific objectives or measures that the court has in mind. Whether this test establishes that recognized rights must be in conflict with each other in order for the state to impose limitations is not clear, and that the Court did not explicitly indicate this may suggest that it is not the case. That is, that the Court simply discussed substantial and pressing concerns, rather than explicitly pointing to interests in upholding specific recognized rights as proper justifications for imposing limitations, suggests that there are interests aside from the other listed rights that may also justify state-imposed limitations on fundamental rights. The *Oakes* two-pronged test has been controversial, and there have been many attempts to articulate its proper means of interpretation, no one of which has garnered wide acceptance.<sup>115</sup>

The case law discussing safety and security concerns as a justification for

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<sup>114</sup> [1986] 1 S.C.R. 103.

<sup>115</sup> See LORI G. BEAMAN, *DEFINING HARM* 63 (W. Wesley Pue ed., UBC Press, 2008).

limitations on freedom of religious expression demonstrates that this justification is understood to be permitted under the modern Canadian conception of freedom of religion and section 1 of the Charter.<sup>116</sup> However, the discussion of the proper application of the justification is vague, and there seems to be disagreement about how narrowly the justification should be construed. Inconsistencies between cases involving motorcycle helmet laws and workplace hard hat policies reveal that there is clearly some uncertainty when the justification is applied to religious head coverings.<sup>117</sup> Similarly, the public policy which has generally been applied to err on the side of allowing the *kirpan* in public settings despite the concerns voiced by some, has been absent in considering prohibitions on this article in some courthouses.<sup>118</sup>

Generally speaking, the courts have articulated that the safety and security justification does exist under the law and may be appropriate under some

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<sup>116</sup> See *Multani*, [2006] 1 S.C.R. 256 (Can.) (noting that a safety or security concern may be an appropriate justification if it is “unequivocally established”).

<sup>117</sup> See *Dhillon*, [1999] 35 C.H.R.R. D/293 (Can.). (in which the court discusses the right to wear the turban while riding a motorcycle when this conflicts with the ability to obey helmet laws); see also *Bhinder*, [1985] 2 S.C.R. 561 (Can.) (in which the Court allows an employer to force an employee to wear helmets in many circumstances, even when this requires the employee to violate a religious mandate to wear a turban).

<sup>118</sup> See *Multani*, [2006] 1 S.C.R. 256 (Can.) (allowing the *kirpan* in a public school); see also *Hothi*, [1986] 3 W.W.R. 671 (Can.) (deciding that a judge retains full discretion to decide whether the *kirpan* should be permitted into the courtroom).



circumstances; however, they are often reluctant to apply it, even when a clear safety or security concern is voiced by the public.<sup>119</sup> In taking such a noncommittal stance, the courts have acquiesced (perhaps intentionally) to a general rule, by which they err on the side of permissiveness. That is, the Canadian courts will generally uphold religious freedom in the face of justified concerns and risk of harm, so long as the risk is solely to the individual whose freedom is protected.<sup>120</sup>

When the concerns are about the safety of others, as in the *kirpan* cases, the courts will still give deference to the right of religious freedom, but seem to do so only by reasoning that a religious symbol with the characteristics of a weapon is not a weapon in the conventional sense.<sup>121</sup> Employing this line of reasoning, the Court in *Multani* side-stepped the task of considering whether a ban on the *kirpan*

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□ *See Dhillon*, [1999] 35 C.H.R.R. D/293 (Can.) (noting that a safety concern is clearly present for a motorcyclist who wears a turban rather than a helmet while riding, but still permitting the exercise of religious freedom); *see also Multani*, [2006] 1 S.C.R. 256 (Can.) (in which the court allows the exercise of religious expression, even in light of public concern about the presence of the *kirpan* in public schools).

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□ *See Dhillon*, [1999] 35 C.H.R.R. D/293 (Can.) (the court decided that a Sikh motorcyclist may be exempted from motorcycle helmet laws in order to wear a turban, largely because the risk of harm was solely to the individual wearing the turban); *But see The Star*, *supra* note 75 (questioning whether the risk is ever solely to the individual right-holder; and suggesting that it is, in a sense, to all tax-paying citizens).

<sup>121</sup>

□ *See Multani*, [2006] 1 S.C.R. 256 (Can.).

is justifiable under a rule prohibiting all weapons by declaring that the *kirpan* is simply not a weapon. The question remaining, particularly in cases of concerns about the security implications of *kirpans* in public schools,<sup>122</sup> is whether the justification of safety and security is actually considered valid in these kinds of cases and, if it is, what kind of rule would allow the courts to best apply it, such that legitimate concerns are mitigated while religious freedoms are limited to the least extent possible.

That safety and security are legitimate justifications for placing limitations on constitutional freedoms is a well-settled point under Canadian legal principles, and there is little to suggest that this is no longer the case. The Canadian Supreme Court has acknowledged this justification,<sup>123</sup> as has the United Nations.<sup>124</sup> Even when the Supreme Court of Canada has upheld constitutional rights in the presence of legitimate safety or security concerns, it has acknowledged that these concerns are still worthy of consideration, and has not suggested that this justification is to be considered invalid or improper in those cases in which it has been applied.

### *B. Developing a Clear Application of the Justification*

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<sup>122</sup> CBC News, Quebec kirpan case, <http://www.cbc.ca/news/background/kirpan/> (last visited Oct. 26, 2008).

<sup>123</sup> See *Big M*, [1985] 1 S.C.R. 295 (Can.).

<sup>124</sup> □ Human Rights Committee, *supra* note 13.

In considering what sort of rule would best allow the Canadian courts to determine when safety and security concerns are substantial enough to justify abridgment of religious freedoms, two principles of are worthy of attention. The first of these, which Robert Audi refers to as the libertarian principle, entails freedom of belief, freedom of worship, and freedom to engage in religious rites and rituals.<sup>125</sup> This principle encompasses the rights that these freedoms necessitate, such as the right to be free from any form of state-sanctioned religion, the right to peaceable religious assembly, and the right to educate one's children in accordance with one's own religion and practices.<sup>126</sup> These rights are subject to such limitations as are necessary to prevent violation of the rights of others.<sup>127</sup>

The second of these principles is what Audi refers to as the neutrality principle, and is founded on the notion that, in order to guarantee the right to reject religious views (a right included in a broad conception of religious freedom), the state should show no preference for religion or religious institutions at all.<sup>128</sup>

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<sup>125</sup> Robert Audi, *Liberal Democracy and the Place of Religion in Politics*, in RELIGION IN THE PUBLIC SQUARE 4-5 (Rowman & Littlefield Publishers, Inc., 2007).

<sup>126</sup> □ *Id.*

<sup>127</sup> □ *Id.* at 5.

<sup>128</sup> □ *Id.* at 6. The idea of state neutrality can be historically traced to common law economic reasoning, and the notion that economic freedom depends upon the absence of government interference in financial decision-making. This reasoning has since been applied to numerous

The libertarian and neutrality principles are linked to the notion that a liberal democracy must, by necessity, reject any notion of state-sanctioned religious establishment.<sup>129</sup> Audi also discusses a third principle, the equalitarian principle, which entails government acceptance of all religions, with an acknowledged preference for one single belief system or group of belief systems in particular.<sup>130</sup> This principle would not be acceptable under the analysis of the Canadian courts, as the idea of a state-preferred religion finds positive consideration nowhere in the Court's opinions. Thus, as interesting as this principle and its potential application to the current state of the Canadian law may be, it falls beyond the scope of this discussion.

In terms of defining the perimeters of the Canadian conception of religious freedom, and determining how and when that freedom may be limited, the courts find themselves considering both the libertarian and the neutrality principles. Thus, it seems that any rule for application of the safety and security justification should rely primarily upon one or -- if practically possible -- both of these

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theories about the benefits of government autonomy and the preservation of individual rights. See HIEBERT, *supra* note 107, at 35.

<sup>129</sup> See e.g. Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 905 (2005).

<sup>130</sup>

□ Audi, *supra* note 125, at 5-6.

conceptions of religious liberty. In examining how these two principles function in an actual liberal democracy, two approaches to religious freedoms may be considered as examples. The first of these is the more restrictive approach taken by the French government. The second is the more permissive approach taken by courts in the United States.

### *1. French laïcité*

In recent years, the practice of organized religion has notably declined throughout Western European nations.<sup>131</sup> This trend is, in some cases, viewed as a result of an increasing distance between religious institutions and government.<sup>132</sup> Others consider the actions of some European governments to be a symptom of changing societal attitudes about religion, resulting in a movement toward a form of strict religious neutrality that seeks to guarantee equality by placing limitations on religious expression in the public sphere.<sup>133</sup>

The secular policies of France, in particular, have attracted international attention. A survey conducted in 2000 revealed that 60% of the French population “never” or “practically never” attended church, the highest rate of any Western

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<sup>131</sup> Noelle Knox, *Religion Takes a back Seat in Western Europe*, USA TODAY, Aug. 11, 2008, available at [http://www.usatoday.com/news/world/2005-08-10-europe-religion-cover\\_x.htm](http://www.usatoday.com/news/world/2005-08-10-europe-religion-cover_x.htm) (last visited Nov. 23, 2008).

<sup>132</sup>

□ *See e.g. id.*

<sup>133</sup>

□ *See* RENATA UITZ, FREEDOM OF RELIGION 126-27 (Council of Europe Publishing, 2007).

European nation.<sup>134</sup> As this suggests, France should not necessarily be viewed as a typical example of a Western European nation seeking to implement religiously neutral policies; rather, it is apt for examination in order to understand and analyze the implications of rigidly secular policies as they have been instituted in one modern liberal democracy.

Historically speaking, France's approach to religious freedom has been typical of a liberal democracy. The nation's constitution provides for freedom of religion.<sup>135</sup> In 1905, the nation passed a law which both officially separated church and state, and prohibited any form of religious discrimination.<sup>136</sup> In recent years, France has adopted a firm secular approach to freedom of religious expression. The French approach, *laïcité* (meaning, very roughly, "secularism"), went into effect in 2004, banning all religious symbols or clothing from public schools in an effort to definitively clarify the issue and end any debate about which symbols should or should not be tolerated.<sup>137</sup> The ban focused primarily on the *hijab*, an

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□ Knox, *supra* note 131.

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U.S. Department of State International Freedom Report: France, <http://www.state.gov/g/drl/rls/irf/2006/71380.htm> (last visited Nov. 23, 2008).

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□ Concordat Watch – Law Separating Church and State (1905): Excerpts, [http://www.concordatwatch.eu/showkb.php?org\\_id=867&kb\\_header\\_id=849&order=kb\\_rank%20ASC&kb\\_id=1525](http://www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=849&order=kb_rank%20ASC&kb_id=1525) (last visited Nov. 23, 2008).

<sup>137</sup>

article which had been a point of controversy within the nation's public schools for some time. *Laïcité* has been extremely controversial both in France and internationally, with some arguing that the banning of all religious symbols is, in fact, contrary to the goals of religious neutrality and secularism.<sup>138</sup> Soon after the enactment of the ban on headscarves in public schools, mass protests were staged both in France and around the world.<sup>139</sup> However, opinion polls showed that a majority of French citizens did support the ban.<sup>140</sup>

It is suggested that *laïcité* is best thought of as a two-way street, keeping religion away from state authority and state authority away from religion; in this sense, it is argued, the policy was enacted as a system of order, intended to create an environment in which religious freedom is granted substantial protection through rigid separation, and thus allowed to “flourish” on its own terms.<sup>141</sup> This conception of religious freedom apparently regards the freedom to be kept away from religious expression within the public sphere as a right that is just as

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□ BBC Online, French Secularism – Laïcité, <http://www.bbc.co.uk/dna/h2g2/A2903663> (last visited Oct. 26, 2008).

<sup>138</sup> See e.g. *id.*

<sup>139</sup> □ DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE 97 (Hart Publishing, 2006).

<sup>140</sup> □ *Id.* at 99.

<sup>141</sup> □ *Id.* at 38-39.

important as freedom of religious expression. Under this view, a guarantee of a state-controlled sphere that is completely devoid of religious symbols and expression is necessary in order to uphold the rights of one group: those who would chose not to be confronted by the religious beliefs of others. It is suggested that by valuing such an ideology to the same degree as positive religious views and beliefs, the state adopts a form of secularism that is biased against religion and religious expression.<sup>142</sup>

Essentially, French *laïcité* requires individuals to consider their status as citizens first and their religious beliefs second, in line with the idea that France places an emphasis on the individual, rather than on any group which he or she may be associated with.<sup>143</sup> It is noted that there is a strong desire in France to create an individual sense of belonging to a broad national community, rather than any particular ethnic or religious group.<sup>144</sup> At least one scholar suggests that this emphasis on the individual as a member of the state facilitates a disregard for recognition of minority or group rights.<sup>145</sup> As one BBC article put it, “anything

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<sup>142</sup> See What is Secularism?, [http://www.secularist.org/what\\_is\\_secularism.htm](http://www.secularist.org/what_is_secularism.htm) (last visited Nov. 23, 2008).

<sup>143</sup> □ See BBC News Online – The Deep Roots of French Secularism, <http://news.bbc.co.uk/2/hi/europe/3325285.stm> (last visited Nov. 23, 2008).

<sup>144</sup> □ MCGOLDRICK, *supra* note 139, at 42.

<sup>145</sup>



that smacks of official recognition of religion -- such as allowing Islamic headscarves in schools -- is anathema to many French people.”<sup>146</sup> This same article traces modern French attitudes about religion back to clashes between church and state during the French Revolution, clearly suggesting that it is not simply a recent trend.<sup>147</sup>

## 2. *The American approach*

The American conception of fundamental rights is another approach that has influenced Canada’s modern view of constitutional freedoms. The United States has considered absolute freedom of religion to be one of the cornerstones of American legal and societal values.<sup>148</sup> The First Amendment’s guarantee of freedom of religion<sup>149</sup> is bolstered by the Civil Rights Act’s prohibition of any form of religious discrimination.<sup>150</sup> The Bill of Rights does not explicitly list freedoms of consciousness and thought, but it is generally agreed upon that “religion,” as used in the First Amendment, is a broad term, encompassing belief systems that do

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<sup>146</sup> □ *See id.* at 43.

□ BBC News Online, *supra* note 143.

<sup>147</sup> *Id.*

<sup>148</sup> □ Library of Parliament, *supra* note 26.

<sup>149</sup> U.S. CONST. amend. I.

<sup>150</sup> □ *Civil Rights Act* (1964).

not involve the conventional, metaphysical concept of religion.<sup>151</sup> Thus, it is not unreasonable to think that the First Amendment guarantee of freedom of religion may include these freedoms by implication, though they are not named explicitly.

The American approach to religious freedom is distinguished from that of France in that French *laïcité* attempts to reach neutrality through the total prohibition of religious expression or symbolism in the public sphere, while the American approach aims to do so by permitting virtually all forms of religious expression. In the mid-1990's, President Clinton issued a statement expressing that, though public schools will not sponsors any particular religious expression, all students are free to exercise and express their religion in schools.<sup>152</sup> Particularly, the Religious Freedom Restoration Act prohibits any ban of religious head coverings in American public schools, and notes that laws requiring neutrality are apt to have an effect similar to that of laws intended to interfere with free religious exercise.<sup>153</sup>

It is said that the United States, by recognizing a positive conception

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□ PETER W. EDGE, *LEGAL RESPONSES TO RELIGIOUS DIFFERENCE* 90 (Kluwer Law International, 2002).

<sup>152</sup> Library of Parliament, *supra* note 26.

<sup>153</sup>

□ *Religious Freedom Restoration Act of 1993*, § 2(a)(2).

religious rights, has developed a negative form of secularism.<sup>154</sup> Under this approach, the state is in a position to bear the burden of protecting religious expression from government interference. This is distinguished from the French approach, under which the state bears the burden of maintaining a distance from the religious practices of individuals, while individuals bear the burden of keeping their religious expression separate from the state.

Though the American approach to freedom of religion is permissive by comparison to French *laïcité*, to suggest that limitations of religious expression are not permitted at all in the United States would be incorrect, as one recent case illustrates. In December, 2008, Lisa Valentine, a Muslim woman, was arrested for refusing to remove her head scarf while going through a courthouse security checkpoint in an Atlanta, Georgia federal court.<sup>155</sup> Valentine, who was accompanying her nephew to a traffic citation hearing, was detained and charged with contempt of court for refusing to comply with a court policy prohibiting any form of head covering.<sup>156</sup> Reports indicate that Muslim women had previously

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□ MCGOLDRICK, *supra* note 139, at 221.

<sup>155</sup> Dionne Walker, “Muslim Woman Jailed Over Head Scarf In Georgia,” THE HUFFINGTON POST, [http://www.huffingtonpost.com/2008/12/17/muslim-woman-jailed-over-\\_n\\_151858.html](http://www.huffingtonpost.com/2008/12/17/muslim-woman-jailed-over-_n_151858.html).

<sup>156</sup>

□ *Id.*; Josh Levs, “Police get training after headscarf wearer’s arrest,” CNN.com, <http://www.cnn.com/2008/US/12/22/georgia.muslim.courthouse/index.html>.

been removed from courtrooms, both in Georgia and in other states, for refusing to remove their head scarves, with the courts citing the same or similar policies against head coverings.<sup>157</sup> As with most court policies, the enforcement of the head covering ban is subject to the discretion of the individual judge and security officers.<sup>158</sup> The incident was followed by at least one public demonstration in which protestors demanded that the federal judge who ordered the arrest step down, with one protestor stating that to enforce this policy in cases involving religious articles of clothing sends the message that “nobody of faith who wears a turban, a *khimar*, a yarmulke or a habit...can enter this court.”<sup>159</sup> Thus, for some, the idea that religious expression may face limitations in the courtroom is indicative of the sentiment that persons of faith have no right to be there at all. As this instance demonstrates, in the United States, as in Canada, the extent to which limitations may be placed upon religious freedoms in a court of law is largely left to a judge’s discretion.<sup>160</sup>

Like the United States, Canada finds the historic roots of its law and public

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<sup>157</sup>

□ Walker, *supra* note 155.

<sup>158</sup>

□ *Id.*

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Levs, *supra* note 156.

<sup>160</sup>

policy in the English legal tradition.<sup>161</sup> However, the two nations are distinguished from each other historically by their substantially different modes of formation.<sup>162</sup> The United States was created through a bloody revolution against the same British Rule under which Canada loyally formed. It is suggested that this particular difference inspired the nations to take different approaches to rights and diversity, leaving Canada initially resistant to the sort of multicultural society that came to define the historical development of the United States.<sup>163</sup> However, despite these distinctions, Canadian law and government have come to follow the United States in many respects since the mid-Twentieth Century.<sup>164</sup>

The influence of the American courts and American legal developments on the Canadian courts is generally undisputed. In recent years, the debate over whether the United States Supreme Court ought to cite to international legal sources has raged on, while the Canadian courts commonly and freely cite to the U.S.<sup>165</sup> It is suggested that Canada's legal and political communities have

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<sup>161</sup> WILLIAM A. SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER* 1-2 (2nd ed., Carswell, 1996).

<sup>162</sup> □ ALBERT J. MENENDEZ, *CHURCH AND STATE IN CANADA* 126 (Prometheus Books, 1996).

<sup>163</sup> □ *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> □ Note, *Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions*, 120 HARV. L. REV. 1936, 1936 (2007).

observed America's approach to law in order to determine both which policies to adopt, and which to avoid.<sup>166</sup> Further, Canadian courts, along with those of other nations, have recently made significantly fewer references to the decisions and policies of American courts.<sup>167</sup> Many regard this trend as a symptom of the international unpopularity of the Bush administration.<sup>168</sup> Nevertheless, the influence of American law on the development of modern Canadian law, particularly in the realm of constitutional rights, is virtually indisputable. This influence is particularly noticeable in similarities between the recent Canadian Charter of Rights and Freedoms and America's Bill of Rights.

The Bill of Rights of the U.S. Constitution is recognized as a highly influential document for liberal democracies, and is sometimes viewed as a basis for the Canadian Charter of Rights and Freedoms. In fact, it is often stated that, by enumerating fundamental rights in the Charter, Canada adopted a judicial system similar to that of the United States.<sup>169</sup> The Charter lists fundamental freedoms

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<sup>166</sup>

□ *See id.*

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□ Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, available at <http://www.nytimes.com/2008/09/18/us/18legal.html?ex=1379390400&en=36f6b0221aa21226&ei=5124&partner=permalink&expprod=permalink> (last visited Nov. 23, 2008).

<sup>168</sup>

□ *Id.*

<sup>169</sup>

□ *See e.g.* SCHABAS, *supra* note 161, at 1.

similar to those named in the First Amendment to the Bill of Rights, and goes a bit further, expanding the list to include freedoms of conscience, thought, and opinion.<sup>170</sup> The influence of the American Constitution and Bill of Rights on the Charter is particularly apparent in instances in which the Supreme Court of Canada has looked to American case law interpreting the Bill of Rights in order to guide in its analysis of the Charter.<sup>171</sup> That the American approach to fundamental rights has influenced both the content and the understanding of the Charter, as well as the Charter's status as one of the primary articulations of Canada's commitment to religious freedoms indicates that this conception is and will likely continue to be of great importance to the Canadian conception of religious rights.<sup>172</sup>

### *C. Considering Canadian Views and Attitudes*

#### *1. Examining the attitudes of the Canadian public*

The Canadian law seems to find itself somewhere in between these two approaches to freedom of religion, with decisions such as that in *Multani* leaning in the direction of the American approach. However, a portion of the Canadian public is less willing to accept freedom of religion as an absolute when it comes to

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<sup>170</sup>

□ Canadian Constitution Act, Part I, § 2(b).

<sup>171</sup>

□ Nation Master – Charter of Rights and Freedoms, <http://www.nationmaster.com/encyclopedia/Charter-of-Rights-and-Freedoms> (last visited Nov. 23, 2008).

<sup>172</sup>

McLachlin, *supra* note 14, at 20.

security concerns, particularly in terms of the debate over the *kirpan* in public schools.<sup>173</sup> Public opinion is apparently split on the question of whether an exception to motorcycle helmet laws should be made for Sikhs based upon the religious requirement of the turban.<sup>174</sup> Some cite the risk of a “substantial taxpayer expense” to provide medical care in the event of a severe, non-fatal accident involving a non-helmeted motorcyclist to dispel the notion that the choice to ride without a helmet is a “victimless crime,” while others regard it as just that.<sup>175</sup> For some, the issue presents a question of where to draw the line when religion infringes upon public safety, noting that the laws of a secular society cannot “be all things to all people,” and suggesting that no exceptions to helmet laws ought to be made on religious grounds.<sup>176</sup> Further, if the importance of religion to the general public and the role that it plays in everyday life are to be taken into account in deciding what kind of rule would be best, it is worth noting that the general attitude of the Canadian public appears to be quickly diverging from that of most Americans.

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□ See Paul Cherry, *Public ‘overreacting’ to alleged kirpan assault, lawyer says*, OTTAWA CITIZEN, Sept. 25, 2008, available at <http://www.canada.com/ottawacitizen/news/story.html?id=76cb6cf2-ca18-44cd-a0cb-1531e42e9241> (last visited Oct. 26, 2008).

<sup>174</sup>

□ The Star, *supra* note 75.

<sup>175</sup>

*Id.*

<sup>176</sup>

□ *Id.*



Despite the influence of American legal trends on the Canadian conception of religious freedom, the United States is regarded as a far more religious nation than Canada.<sup>177</sup> Statistical data demonstrates that the American public leads the English-speaking world in terms of faith and religious devotion.<sup>178</sup> From the early 1990's to the early 2000's, the percentage of the Canadian population who identified themselves as having no religion increased from 12% to 16%, putting the citizens of Canada on equal footing with those of the United Kingdom, 16% of whom also identified as having no religion.<sup>179</sup> The percentage of U.S. citizens who identify with no religion is currently 14%.<sup>180</sup> Those in the United States who do identify with a particular faith tend to hold a more fundamental position, with 31% of Americans regarding the Bible as the literal word of God, as compared to 14% of Canadians.<sup>181</sup> Further, there is reason to believe that the number of devoutly religious Canadians will continue to fall, as this has been the general trend within

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□ Christopher L. Eisgruber & Mariah Zeisberg, *Religious Freedom in Canada and the United States*, 4 INT'L J. CONST. L. 244, 246 (2006).

<sup>178</sup>

□ *Id.* at 245.

<sup>179</sup>

Lorrayne Anthony, *Growing number of Canadians losing their religion*, *Statistics Canada reports*, available at <http://www.wwrn.org/article.php?idd=3904&sec=74&con=5> (last visited Nov. 23, 2008).

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□ United States Religious Demographic Profile, <http://pewforum.org/world-affairs/countries/?CountryID=222> (last visited Nov. 23, 2008).

<sup>181</sup>

Eisgruber, *supra* note 177, at 245.

the nation for some time. In 1957, 99% of Canadians claimed a belief in God and 82% belonged to a church; currently, less than one third of Canadians belong to a church.<sup>182</sup> Given these numbers, the Canadian public seems more similar to that of a nation like France, where religious affiliations and belief in God have been notably declining, than to that of the United States.<sup>183</sup>

The statistical evidence shows that the importance of religion to the Canadian populous as a whole is not on par with that of the American public, and suggests that the gap will continue to widen. This is not, of course, to say that religious expression or the freedoms that facilitate it are less important or less relevant to those of faith (or even to those who are not religious) in Canada than to those of faith within the United States; it simply suggests that a trend towards the secular is apparent in the general attitudes of the Canadian public (as distinguished from the Canadian law).<sup>184</sup> In this particular regard, Canada may be viewed as

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<sup>182</sup>

□ *Id.* at 249.

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□ STEVEN GOLDBERG, *BLEACHED FAITH* 94 (Stanford University Press, 2008).

<sup>184</sup>

See Graeme Hamilton, *Losing faith in Quebec*, Nov. 3, 2007, available at <http://www.nationalpost.com/news/story.html?id=08876ab3-a800-4995-b9d0-7eea7a703938&k=60734&p=1> (noting that the province of Quebec is “increasingly secular,” and discussing recent actions to facilitate a multi-religious approach to ethics in public schools); see also Erin Roach, *Mandatory class says all religions are true*, Baptist Press, Feb. 5, 2009, <http://www.bpnews.net/BPnews.asp?ID=29813> (noting that many parents have recently requested that their children be exempted from classes teaching about religion, with some claiming that the mandatory nature of the classes violates freedom of conscience).

more similar to a European nation such as France than to the United States.

2. *Attitudes apparent in the Canadian conception of fundamental rights*

The Canadian conception of fundamental rights in general seems to stray from the American conception, particularly in light of the “notwithstanding” clause of the Charter of Rights and Freedoms.<sup>185</sup> This provision, unique or odd as it may be, makes it clear that the Canadian Charter permits the legislature to enact laws that limit fundamental rights based upon any justification (or, apparently, even without a justification).<sup>186</sup> Further, the “notwithstanding clause” reiterates a provision of section 2 of the Canadian Bill of Rights of 1960, which allows “an Act of the Parliament” to declare that a law may take effect “notwithstanding to Canadian Bill of Rights.”<sup>187</sup> These provisions suggest that the existence of legitimate justifications for which these rights may be limited has been previously contemplated and accepted as valid by the very same Canadian discourse that has defined and articulated the right to religious freedom.

The unique and unprecedented nature of these provisions also demonstrates

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<sup>185</sup> Canadian Constitution Act, *supra* note 111.

<sup>186</sup> *See id.*

<sup>187</sup> Canadian Bill of Rights, S.C. 1960, c. 2.

that a comparison of Canada's conception of fundamental freedoms to that of any other nation will only go so far in illuminating how freedoms are to be understood or protected under the Canadian law. However, despite the differences between the Canadian and American approaches to religious freedom, the Canadian articulation of this right is closer to the American conception than to that of other formerly-British nations in important respects.<sup>188</sup> Thus, the role that the American understanding of rights and limitations plays in Canadian law is essential.

The Supreme Court of Canada clearly is not willing to accept a view of secularism that is as polarizing as French *laïcité*. In the 2002 case *Chamberlain v. Surrey School District No. 36*,<sup>189</sup> the court discussed the meaning of the term “secular” as it applies to the religious obligations of public schools. Here, the Court denied that this term should be understood as equivalent to “non-religious,” and instead held that the secular sphere should not be understood to exclude religion; rather, the law's position should allow for expression of both religious and non-religious convictions in the public sphere.<sup>190</sup> In that case, as is typical, the Supreme Court of Canada leans toward an understanding of freedom of religion

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<sup>188</sup> See EDGE, *supra* note 151, at 98 (stating that Canada's articulation of rights is closer to that of the United States than to that of Australia, a nation also founded under British rule).

<sup>189</sup> [2002] 4 S.C.R. 710 (Can.).

<sup>190</sup> *Id.*

that is similar to that of the United States, and which seems to follow the libertarian principle. It is suggested that the Court's idea of religious freedom, as described in *Chamberlain*, implies that religion falls completely outside of the control of the law, just as the law falls outside of the control of religion.<sup>191</sup> Even if the idea that religion falls outside of the law is accepted, the question remains whether limitations may be implemented when religion touches upon areas which the law may control, such as the regulation of legitimate safety concerns.

Given the emerging religious attitudes of the Canadian public, the indication that legitimate safety concerns may in fact justify an abridgment of fundamental rights, and the courts' desire to give deference to the right to free religious expression, it seems clear that a rule allowing the limitation of religious freedom in some cases is permissible, but should be very narrowly tailored in order to avoid any unnecessary abridgment of freedoms. It is also evident that a straight-forward standard is most favorable, rather than an approach which allows for deference to considerations of the local context, which are generally regarded as ill-advised.<sup>192</sup>

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□ Ian T. Benson, *Considering Secularism*, *RECOGNIZING RELIGION IN A SECULAR SOCIETY* 83 (McGill-Queens University Press, 2004).

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See Hans Werdmolder, *Headscarves at Public Schools: The issue of open neutrality reconsidered*, *RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE: WHERE TO DRAW THE LINE* 165 (2007).

### 3. *Comparison to analogous cases*

In considering how the Canadian courts might best create a clear-cut rule to determine when freedom of religion may face limitations due to safety concerns, it may be helpful to draw an analogy to cases involving religious refusal to receive blood transfusion. These cases can be differentiated from those in which religious expression clashes with legitimate concerns about safety and security, in that they involve scenarios in which the religious expression in question is a choice to allow harm to the individual to occur rather than to accept medical treatment. That is, in these cases, the right to religious expression, if protected and exercised, would necessarily allow harm, rather than simply allow the risk of harm. Thus, the courts weigh the interest in mitigating the harm itself (as opposed to the *risk* of the harm) against the right to religious expression. These cases are appropriate analogies to those involving safety and security concerns because they show how much weight is accorded to religious rights when weighed against immediate and medically certain harm, rather than simply the risk of the harm.

In *Malette v. Shulman*,<sup>193</sup> the Ontario Court of Appeals considered whether an adult Jehovah's Witness was entitled to withhold consent and forego a blood transfusion on religious grounds, thus placing her own life in jeopardy. The court

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<sup>193</sup> [1990] 67 D.L.R. (4th) 321 (Can.).

decided that freedom of religion requires a right to make decisions concerning one's own bodily integrity in accordance with one's faith, even when those decisions are contrary to the general legal goals of safety and personal well-being.<sup>194</sup> This case suggests that an individual has a right to religious expression even when it poses a direct risk to his or her own safety, so long as it does not pose a risk to the safety of others.

Five years after *Malette*, in *B (R.) v. Children's Aid Society of Metropolitan Toronto*,<sup>195</sup> the Supreme Court of Canada considered whether freedom of religion allowed parents to withhold consent to a blood transfusion for their infant daughter on religious grounds when the procedure may have been necessary to save the child's life. The Court held that, in general, freedom of religion does grant parents the right to raise their children in accordance with their religious beliefs, but also stated that "freedom of religion is not absolute."<sup>196</sup> The Court decided that, despite genuine concerns about parents' religious freedoms, it was appropriate for the state to assume responsibility for the child, essentially treating her as a ward of the state, and thereby giving the state the right to choose to provide the necessary blood

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<sup>194</sup> *Id.*

<sup>195</sup> [1995] 1 S.C.R. 315 (Can.).

<sup>196</sup> *Id.*

transfusion.<sup>197</sup> This suggests that the protection of an individual from imminent and medically certain harm is a very strong interest, in that it overcomes not only religious freedom, but also the rights of parents to make decisions concerning their children.

Cases involving the religious right to refuse medical treatment have sparked scholarly discussion that regards the legal reaction to those who forego treatment in accordance with religious dictates as demonstrative of a fear of religious extremism.<sup>198</sup> Though the implications of these blood transfusion cases with regard to perceptions about religious choice remain debatable, the cases do demonstrate that, under the Canadian courts' conception of freedom of religion and the safety and security justification for the abridgment of that freedom, a distinction is made between instances in which a capable adult chooses to put herself at risk in favor of her right to religious exercise and those in which an individual's right to religious exercise puts another<sup>199</sup> at risk.

#### *D. Recommending a New Approach*

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<sup>197</sup>

□ *Id.*

<sup>198</sup> BEAMAN, *supra* note 115, at 4 (linking the religion-based resistance to medical treatment with a perceived religious "wish to die").

<sup>199</sup> Presumably the person put at risk need not necessarily be a child, as in *Children's Aid Society*, in order for the instance of religious expression to be subject to scrutiny and possible limitation.



The general principle inferred from the blood transfusion cases can be applied directly to cases involving helmet laws and hard hat policies to suggest that a capable adult should be granted the opportunity to make her own decision when presented with a situation in which her own religious expression clashes with concerns about her own personal safety. In terms of helmet laws and hard hat policies, the Court would be well-advised to give deference to the individual's religious freedoms. In doing so, the individual has the right to choose what safety precautions are possible and necessary in order to preserve personal safety while still honoring religious dictates. Concerns about the risk posed to tax-paying citizens,<sup>200</sup> while legitimate, do not seem strong enough to outweigh the substantial interest in deferring to religious freedom. After all, tax revenue is collected in order to allow the government to function properly, and one essential purpose of the government is to guarantee rights which it recognizes as fundamental. Thus, it would seem that the expenditure of government funds in order to allow the exercise of religious freedom is proper, if not mandated.

The general principle from the blood transfusion cases is not so simply

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<sup>200</sup> See *The Star*, *supra* note 75 (in which a citizen voices this concern, arguing that the costs of government-provided health care for an injured motorcyclist would burden society as a whole, thus demonstrating that the risk posed by riding without a helmet is never solely to the individual rider).

applied to cases in which an individual's religious freedoms clash with concerns about the safety of others. Though it is clear after *Children's Aid Society* that a parent's right to religious expression under the Canadian law is limited when his child is put at serious risk of near-certain harm,<sup>201</sup> to what degree is an individual's right to religious expression limited when it creates a potential or perceived safety risk for the children of others, as in cases involving the *kirpan* in public schools?

In situations in which the security of others (that is, persons other than the one exercising the religious freedom) is of concern to the general public (most often, situations involving the *kirpan*), the courts have decided that a judge may have deference when determining whether the *kirpan* is a weapon in the courtroom,<sup>202</sup> but no such deference is given to public school administrators or to a judge who is hearing a case involving the *kirpan* in schools. Here, a clear rule might be conditioned to focus on the particular *kirpan* in question. That is, a student in school or an individual appearing in court ought to have a right to practice his religion, but should also consider the concerns and rights of those around him; thus, the *kirpan* should be allowed in these settings so long as certain

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<sup>201</sup> See *Children's Aid Society*, [1995] 1 S.C.R. 315 (Can.), limiting the rights of parents to assert freedom of religious expression when that expression places their child at a direct risk of significant harm.

<sup>202</sup> See *Hothi*, [1986] 3 W.W.R. 671 (Can.).

definite, legally recognized precautions have been taken. One Canadian case has suggested that the *kirpan* could be blunted and secured in such a way that it cannot be unsheathed or used as a weapon.<sup>203</sup> This discussion applied to the *kirpan* in a public school, but could have broad applications where this religious article causes concerns. If such precautions are possible within the realm of the practice of the Sikh religion, then it seems a logical and legitimate exercise of the law to require them in the particular realms in which the presence of the *kirpan* has been a cause for concern. Such narrow regulation would mitigate security concerns with a minimal affront to religious freedom.

In order to be effective as a standard for use by the entire judicial system, this rule must be spelled out clearly. Such an articulation would relate to the Court's discussion in *Multani*, noting that the *kirpan* is not actually a weapon, but rather is a religious article with the characteristics of a weapon.<sup>204</sup> Because the *kirpan* is not actually a weapon, it is not necessary for the individual carrying it to have any ability to use it as a weapon. Rather, it must simply maintain its presence and function as a symbol of religious observation. Thus, to have the *kirpan* blade

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<sup>203</sup> See *Tuli v. St. Albert Protestant Separate School District No. 6*, [1985] 8 C.H.R.R. D/3906 (Can.) (discussing precautions which may be taken to facilitate the recognition of the *kirpan* as a legitimate religious article while hedging the security concerns voiced by school officials).

<sup>204</sup> *Multani*, [2006] 1 S.C.R. 256 (Can.).

dulled in such a way that it poses no more threat than a legal item such as a car key would mitigate the perceived threat. Further, the *kirpan* should be tied securely, such that it is evident that it is not easily accessible for use as a weapon. These regulations, strictly applied and made known to the general public, could alter the image of the *kirpan* so that it is recognized not for its reputation as a potential threat to safety, but rather for its true purpose as a symbol of religious devotion.

It seems clear at this juncture that there will still be some debate among the Canadian public when it comes to the intersection of religion and safety or security concerns. To give the Canadian judiciary clear guidelines to follow will send a message to those who express such concerns and, perhaps more importantly, to those who fear that their religious rights may face undue limitation, that the courts remain devoted to striking a fair, consistent balance between fundamental rights and public safety, and that the essential values of the liberal democracy remain firmly intact.

## V. CONCLUSION

It is said to be “beyond dispute” that “a society without religious liberty is simply not adequately free.”<sup>205</sup> This assertion finds support in the legal discourse and the enumerations of fundamental rights of virtually every modern liberal

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<sup>205</sup> Audi, *supra* note 125, at 4.

democracy. Thus, in considering the Canadian courts' approach to safety and security as justifications for limitations of religious freedom, deference must be given to the religious rights of individuals in order to maintain Canada's status as a liberal democratic nation.

The essential question at all points is: when, if ever, are limitations of religious freedom justified? The precedents of the Canadian courts leave little doubt that this freedom is not absolute, and that some other interests are worthy of consideration.<sup>206</sup> To the extent that the right of all individuals to be kept safe and to feel secure is a recognized interest, the primary aim should be to find some extremely narrow means of upholding this right and protecting the well-being (and perceived well-being) of the general population, while eclipsing the right to freely express one's religious beliefs as little as possible. Due to the undeniably high value of the right to religious expression, the narrow conception of any limiting measures taken to protect safety and security is essential.

The approach to safety and security as a justification that is suggested herein attempts to make narrow means and minimized limitation of religious freedoms a primary consideration. It focuses on the rights of the individual to make decisions

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<sup>206</sup> See *Children's Aid Society*, [1995] 1 S.C.R. 315 (Can.), holding the interest in administering a life-saving blood transfusion to a child to outweigh the rights of the child's parents to prevent the transfusion on grounds of a religious objection.

about his or her own safety when it conflicts with his or her own right to religious expression. When religious expression poses a perceived risk to others, then some narrow limitations may be appropriate if no other feasible means of mitigating legitimate concerns are available. This approach is consistent with the Canadian courts' precedents in most respects, and seeks to maintain Canada's current conception of religious freedom, while offering principles to guide the courts as they further consider and form a definitive approach to cases in which the right to religious freedom clashes with other legitimate, recognized rights.